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In The

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

LYLE GERALD JOHNS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the automobile exception to the warrant requirement should be extended to allow the warrantless search of packages found in an automobile three days after their seizure when the focus of the police investigation was on the packages and there was no automobile search in progress at the time of their seizure.

2. Whether the automobile exception to the warrant requirement should be extended to allow searches not justified by the reasons that support the exception.

TABLE OF CONTENTS

Pages

Statement 1

Introduction and Summary of Argument 4

Argument I

The warrantless search of packages three days after their seizure from vehicles, not the focus of searches themselves, violated the Fourth Amendment 10

Argument II

The reasons supporting the *Ross* exception to the Warrant Clause do not justify this search 15

Argument III

The other reasons advanced by the petitioner do not justify reversing the Court of Appeals 30

Conclusion 40

TABLE OF AUTHORITIES

CASES:

Agnello v. United States, 269 U.S. 20, 30 (1925) 39

Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979) 9, 21, 34, 35, 37

Cady v. Dombrowski, 413 U.S. 433, 439 (1973) 17, 20

Cardwell v. Lewis, 417 U.S. 583, 590 (1974) 20

Carroll v. United States, 267 U.S. 132, 153 (1925) 19, 20

Chambers v. Maroney, 399 U.S. 42, 61 (1970) 17, 19, 28, 37

Chimel v. California, 395 U.S. 752, 760, 768 (1969) 9, 18, 23, 26, 27, 36, 37

Coolidge v. New Hampshire, 403 U.S. 443, 459-60 (1971) 20, 28, 37

TABLE OF AUTHORITIES—Continued

Pages

Cooper v. California, 386 U.S. 58, 62 (1967) 36

Ex parte Jackson, 96 U.S. 727 (1878) 12, 21

Florida v. Meyers, no. 83-1279 (Apr. 23, 1984) 6, 14, 15, 19

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 18, 19, 20, 23, 24, 27, 29

Illinois v. Lafayette, No. 81-1859 (June 20, 1983) 37

Katz v. United States, 389 U.S. 347, 351-52 (1967) 16, 17

Marshall v. Barlow's Inc., 436 U.S. 307 (1978) 37

Michigan v. Thomas, 458 U.S. 259, 261-62 & n. 2 (1982) 6, 20, 26

Michigan v. Clifford, No. 82-357 (Jan. 11, 1984) 17, 18, 23, 27

Michigan v. Tyler, 436 U.S. 499, 511 (1978) 7, 18, 20, 23, 24, 26, 27, 29, 34

Mincey v. Arizona, 437 U.S. 385, 390 (1978) 5, 17, 18, 20, 23, 24, 27, 32

New York v. Belton, 453 U.S. 454, 457 (1981) 5, 7, 26, 39

Preston v. United States, 376 U.S. 364, 368 (1964) 18, 23

Rakas v. Illinois, 439 U.S. 128, 139 (1978) 16

Robbins v. California, 453 U.S. 420 (1981) 9, 10, 22, 33, 34

Segura v. United States, No. 82-5298 (July 5, 1984) 17, 31, 32

Sharpe v. United States, 712 F.2d 65 (4th Cir. 1983), *cert. granted on other issues*, No. 83-529 (June 18, 1984) 33

Smith v. Maryland, 442 U.S. 735, 740 (1979) 16

South Dakota v. Opperman, 428 U.S. 364, 381 (1976) 17, 20, 36, 37

Terry v. Ohio, 392 U.S. 1, 19 (1967) 17, 23

TABLE OF AUTHORITIES—Continued

Pages

Texas v. Brown, No. 81-419 (Apr. 19, 1983) 17, 28

Texas v. White, 423 U.S. 67, 68 (1975) 20

United States v. Chadwick, 433 U.S. 2 (1977) ..... passim

United States v. Edwards, 415 U.S. 800 (1974) 37, 39

United States v. Jacobsen, No. 82-1167 (Apr. 2, 1984) 21

United States v. Leon, No. 82-1771 (July 5, 1984) 26

United States v. Place, No. 81-1617 (June 20, 1983) 21, 28, 31, 32

United States v. Rabinowitz, 339 U.S. 56 (1950) 9, 26, 36

United States v. Rivera, 654 F.2d 1048, *on reh'g.*, 864 F.2d 308 (5th Cir. 1982) 33

United States v. Ross, 456 U.S. 798 (1982) ..... passim

United States v. United States District Court, 407 U.S. 297, 318 (1972) 17, 36, 37

United States v. Van Leeuwen, 397 U.S. 249 (1970) 12

Walter v. United States, 447 U.S. 447 U.S. 649 (1980) 21, 29

Weeks v. United States, 232 U.S. 383, 392 (1914) 39

OTHER AUTHORITIES:

Fed.R.Crim.P. 41(c)(1) 32

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 410-11 (1974) 17

Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Colum.L.Rev., 1365, 1397 (1983) 26, 37

The Fourth Amendment, U.S. Constitution ..... passim

STATEMENT

Respondents adopt the statement of Petitioner in the BRIEF OF THE UNITED STATES (hereinafter Pet. Br.) with the following additions and corrections.

1. In Pet. Br. 3, the Petitioner recites that Customs officers maintained surveillance of the two trucks as they travelled one hundred miles to a private airstrip near Bowie, Arizona. While enroute to Bowie, the vehicles were stopped by Arizona state authorities who were in the process of monitoring highway traffic. Upon noticing the stop, surveilling Customs officers requested by radio that the occupants of the trucks be identified. Customs officers thereafter learned the identity of the occupants of the trucks. They also were told by the state police that the occupants of the vehicles stated that they were en route to Bowie to pick up an old auto which had broken down, but upon examination of the trucks, the police could not detect any towing equipment, bars, ropes, etc. They further learned that one officer, upon examination, detected a toy derringer in one of the vehicles. 11/9/81 Tr. 64, 208.

2. In Pet. Br. 4, Petitioner indicates that as the Customs officers approached the trucks to investigate, they detected the odor of marijuana and then saw Respondents throw a blanket over the contents of one of the trucks. Petitioner then alleges that "[i]n the trucks, the officers found some 40 square packages wrapped in plastic and dark green trash bags secured with tape."

This recitation is both cursory and not fully supported by the record. The first officer on the scene (Officer Eshelman) noticed two trucks parked back to back as he approached the vehicles. When the officer got within

about 30 yards of the vehicles, he noticed several individuals covering up plastic garbage bags in the rear end of one of the trucks (a Chevrolet). He then exited his vehicle, ordered the Respondents to come out from behind the trucks, and approached the trucks. As he approached, he smelled the odor of marijuana. He approached the Chevrolet, opened the rear cargo door, which had just been closed, and observed the packages which he had seen as he exited his automobile some 30 yards away. He then looked into the back of the other truck (the GMC), which was open, and noticed similar packages there. 11/9/81 Tr. 212-16. The packages seen in each vehicle were of two types: some were cardboard boxes wrapped in heavy, double-ply green garbage bags which were taped with heavy masking tape, and others were in two thicknesses of heavy bags taped with masking tape. The packages in each vehicle were partially covered by blankets, but visible to the officer as he approached the vehicles. 11/9/81 Tr. 134.

As the first officer exited his vehicle, a second officer (Officer Young) pulled up behind him. He exited his vehicle and, as the officers approached the trucks together, he smelled the odor of marijuana and saw the packages in the open GMC truck simultaneously from a distance of approximately 15 to 20 feet. 11/9/81 Tr. 126-28. Both officers, at this point, believed the packages to contain marijuana based on the odor, their experience with smuggling operations of this type, and the fact that marijuana was commonly wrapped in packages of the sort they observed as they approached. 11/9/81 Tr. 128, 216. The Respondents were then placed under arrest. Officer Eshelman advised Officer Young that they had "two trucks loaded

with marijuana." The trucks were transported to the Drug Enforcement Administration headquarters in Tucson and the packages stored in a warehouse for three days.[1] Thereafter, the packages were opened and core samples removed.[2] No searches of the trucks were done at the scene or at any time thereafter. 11/9/81 Tr. 129, 215-17.

3. In the trial court and on appeal to the United States Court of Appeals for the Ninth Circuit, the Petitioner initially argued that the search of the packages was permissible because the packages were discovered in plain view and not as the result of any search of the vehicles. Brief of Appellant, Ct. App. 5, 10-11.

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[1]The Petitioner's allegation, Pet. Br. 4, that "the officers found some 40 square packages" in the trucks at the scene is not supported by the record. There is no evidence that the officers did anything at the scene other than take a "quick look" at the packages and then transport them to the Drug Enforcement Administration headquarters. 11/9/81 Tr. 135. Neither vehicle was searched at the scene. 11/9/81 Tr. 129. In his statement of facts in support of his MEMORANDUM OF DECISION AND ORDER, the trial court found only that the officers "view[ed] the sealed containers." No search of the vehicles or counting of the containers is to be found in the record. Pet. App. 21a.

Petitioner's citations of authority for the allegation that the packages were counted at the scene is not supported by the record. In fact, one citation given by Petitioner, 12/11/81 Tr. 35, indicates that when the packages were counted, at the warehouse, there were "approximately" 44 sacks. There is no indication from that citation that the packages of marijuana were counted at the scene, or given anything other than a cursory glance.

[2]There is no evidence in the record to indicate how the samples were removed from the packages, how much was taken from each package of marijuana, or from which packages of marijuana samples were taken.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two related but independent issues with respect to the application of the automobile exception to the warrant requirement and its relationship to package searches: (1) whether the automobile exception to the warrant requirement should be extended to allow the warrantless search of packages found in an automobile three days after their seizure when the focus of the police investigation was on the packages and there was no automobile search in progress at the time of their seizure; and (2) whether the automobile exception to the warrant requirement should be extended to allow searches not justified by the reasons in support of the exception.

Petitioner contends that the search of the packages of marijuana performed at the station house three days after the seizure of the packages was permissible because of an "initial, concededly lawful search of the trucks" at the scene. Pet. Br. 9-10. Petitioner reasons that since the packages could have been lawfully searched there, that they could lawfully be searched later pursuant to this Court's decision in *United States v. Ross*, 456 U.S. 798 (1982).

Ross, however, is not controlling given the facts of this case. *Ross* applies only to situations where police officers are engaged in a legitimate vehicle search and need to search packages which are found during the course of the search to finish the search. No vehicle search was ever conducted in this case. Hence, pursuant to this Court's opinion in *United States v. Chadwick*, 433 U.S. 2 (1977), a warrant was required for the search of the packages.

Even assuming that there was a legitimate vehicle search at the scene, *Ross* should not be extended to cover this case, because to so extend *Ross* would be to extend the automobile exception to the warrant requirement beyond the reasons for the exception.

A. This case is not controlled by *Ross* because the packages seized in this case were not seized as a part of an ongoing vehicle search. Rather, they were seized when the focus of a police investigation was exclusively on the packages at a time moments after they were placed in the rear compartment of two pickup trucks. There is no evidence in the record that the officers in this case ever conducted a search of the vehicles in which the packages were found or ever focused their investigation on the vehicles. Therefore, the automobile exception to the warrant requirement does not apply in this case. This case must be governed by the general rule that packages may be searched only with a warrant issued by a neutral and detached magistrate.

B. Even if the Customs officers had lawfully searched the trucks, they would not have been able to search the packages three days later at the D.E.A. warehouse without a warrant. All warrantless searches are *per se* unreasonable, subject to a few, well-delineated exceptions. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). These exceptions are no broader than the reasons that gave rise to them. *Id.* at 405; *New York v. Belton*, 453 U.S. 454, 457 (1981). Most of these exceptions permit warrantless searches only when it would be impracticable to obtain a warrant. *United States v. United States District Court*, 407 U.S. 297, 318 (1972).

The presumption in favor of warrants does not apply to automobiles. *Florida v. Meyers,* no. 83-1279 (Apr. 23, 1984), slip op. 3. The reason the presumption does not apply is that since the time that the Fourth Amendment was enacted, it has been understood that transportation vehicles can be searched without a warrant. *United States v. Ross,* 456 U.S. at 805-06. Therefore, the practicability of obtaining a warrant does not affect the right to search an automobile. *See Michigan v. Thomas,* 458 U.S. 259, 261-62 & n. 2 (1982). If the police have probable cause, they can conduct a warrantless search of an automobile where it is found on the highway, or days later, after it has been impounded at the police station. *Id.*

The presumption in favor of warrants does apply to packages. *United States v. Chadwick,* 433 U.S. at 7. An exception to this warrant requirement occurs when the packages are found inside an automobile during the course of a lawful automobile search. *United States v. Ross,* 456 U.S. at 824-25. As part of the automobile search, the police may conduct a warrantless search of the packages if the object of their search might be found inside the packages. *Id.*

Two reasons support this exception to the warrant requirement. First, requiring the police who are conducting a lawful warrantless search of an automobile to stop their search and apply for a warrant any time a package is found would unduly hinder the completion of the automobile search. The police would never be sure they had completed the automobile search until they had obtained a warrant to search every package found inside the automobile. *Id.* at 820, 822, n. 28 . This would undermine the rationale that permits the warrantless search of automobiles.

Second, the police and the lower courts need a bright line rule that will tell them when a warrantless search is permissible and when it is not. *Id.* at 803-04. This exception, which tells them that they may conduct a warrantless search of packages as part of a lawful automobile search, provides that bright line rule.

This exception to the warrant requirement, like its other exceptions, should not be any broader than the reasons that gave rise to it. The reasons behind this exception do not justify its application to this case. First, the search of the packages was delayed for three business days. The agents had ample opportunity to obtain a warrant during those three days. If they had obtained a warrant, the search of the pickups would not have been delayed or hampered in any way. The rationale behind the automobile exception would not have been undermined. Second, in drawing any bright line, the first principle of Fourth Amendment jurisprudence, that all warrantless searches are *per se* unreasonable, should be emphasized. *New York v. Belton,* 453 U.S. at 457. Stressing this principle, the *Ross* court drew the line so that automobile searches would not be made impractical by a requirement that the police obtain a warrant every time a package is found during an automobile search. Requiring the police to obtain a warrant to search the packages in this case would not have hindered or impeded the search of the pickups. As this Court has done in the past, the bright line should be drawn where it became practicable to get a warrant. *Michigan v. Tyler,* 436 U.S. 499, 511 (1978), *United States v. Chadwick,* 433 U.S. at 15-16.

The Petitioner's reliance on the various cases that allow the warrantless search of automobiles days after they have been impounded at the police station is misplaced. None of these cases involved the searches of packages; they involved the searches of automobiles. Since warrants are virtually never required to search an automobile, the practicability of obtaining a warrant before the search is irrelevant. The same is not true of packages. Warrants are normally required to search packages. Therefore, warrantless searches of packages should not be allowed unless it was not practical to obtain a warrant. If the police find a package in the course of a lawful automobile search, it would be impractical to require them to obtain a warrant before they could complete the automobile search by looking into the package. It is not impractical, however, to require them to obtain a warrant days after the automobile search has been completed and the packages have been secured in a government warehouse.

C. The other reasons advanced by the Petitioner do not justify reversing the Court of Appeals. Contrary to the Petitioner's argument, the statement in *Ross,* that the warrantless search of an automobile may be as thorough as a magisrate could authorize in a warrant (456 U.S. at 800), does not support this search. The Respondents do not complain about the thoroughness of the search. Rather, the Respondents complain that the packages were secured for three days before they were searched without a warrant.

The Petitioner also argues that the fact that the novelty of Respondents' position illuminates the "profession's

understanding" that the position does not have merit. Before *Ross,* most litigants would have relied on *Robbins v. California,* 453 U.S. 420 (1981). Only two years have elapsed since *Ross* was decided. That is not enough time to illuminate the profession's understanding. Next, the Petitioner argues that in most automobile searches, packages and other containers will be removed from the automobile before they are searched. The Respondents' argumentment is not based on the mere separation of the packages from the trucks. Rather, Respondents' position is that the focus of the investigation was limited to the packages and that their search was not part of any on-going vehicle search.

Finally, the Petitioner argues that the Respondents had a diminshed expectation of privacy in their packages which would allow a warrantless search. To the extent this argument is based on a claim that the packages could not support any reasonable expectation of privacy because, by their very nature, they announced their contents, *Arkansas v. Sanders,* 442 U.S. 753, 764-65, n. 13 (1979), it is untenable. The District Court, after hearing all the evidence, rejected this argument, finding that neither the shape, nor any other characteristic of the packages, made their contents readily ascertainable. Pet. App. 28a. Nevertheless, Petitioner argues, relying on *United States v. Rabinowitz,* 339 U.S. 56 (1950), that the searches were reasonable. The Petitioner omits that *Rabinowitz* was overruled by *Chimel v. California,* 395 U.S. 752, 760, 768 (1969). The search was not reasonable because it was a search of packages without a warrant and because the search was not done as part of an automobile search, but was done three days later when the packages had been secured at the D.E.A. warehouse.

ARGUMENT

I.

The Warrantless Search Of Packages Three Days After Their Seizure From Vehicles Not The Focus Of Searches Themselves, Violated The Fourth Amendment.

Prior to *United States v. Ross,* 456 U.S. 798 (1982), this Court held that packages found in the course of a lawful automobile search could be seized but not searched themselves except pursuant to a legally obtained search warrant. *Robbins v. California,* 453 U.S. 420 (1981). In *Ross,* however, this Court overruled *Robbins,* holding that the automobile search exception to the warrant requirement applies to all "containers and packages" found inside the vehicle during a lawful vehicle search. 456 U.S. at 824-25.

In *Ross,* the police had information from a reliable informant who told them that a subject would be carrying narcotics in the trunk of his car. The informant, who had been proven reliable in the past, gave a detailed description of the driver and the automobile. Upon seeing a vehicle and driver matching the descriptions given, police officers stopped the vehicle and began a thorough search of the interior of the vehicle. They searched the entire interior of the car, including the glove compartment. They then took the driver's keys, opened the trunk and found a closed brown paper bag. The bag was opened, disclosing a number of glassine bags containing a white powder, which the police believed to be a narcotic drug. The police replaced the bag, closed the trunk, and drove the car to headquarters.

At the station, they searched the car again, discovering a zippered pouch in the trunk containing a large sum

of cash. A later laboratory analysis determined that the powder in the paper bag was a narcotic.

Despite the fact that no warrant was obtained for either the search of the brown paper bag during the first search of the automobile or the search of the red zippered pouch at the station house, this Court held that the searches of both packages were legal pursuant to the automobile exception of the warrant requirement.

Essential to this Court's holding in *Ross* was the fact that both the paper bag and the zippered pouch were found "in the course of a legitimate warrantless search of an automobile." 456 U.S. at 817.

In *Ross,* this Court stressed practical considerations that justify a warrantless search of the package found in the course of a warrantless automobile search.

> "*When a legitimate search is underway,* . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion *of the task at hand.*" 456 U.S. at 821. (emphasis added)

This Court's holding in *Ross* was grounded in the practical need of police officers to complete a search of a vehicle wherein they suspect contraband might be found when the locus of the contraband is undetermined. In such a case, this Court reasoned that to allow less than a search of the entire automobile would be to frustrate the purpose of the automobile exception to the warrant requirement.

> "The practical considerations that justify the warrantless search of an automobile continue to apply

until the entire search of the automobile and its contents has been completed." *Id.* at 821, n. 28.

The Court's decision in *Ross,* which allows the warrantless search of the package found during the course of a legitimate automobile search must be contrasted with the general rule that police officers must obtain a warrant to search a package, even if the package is found in an automobile, when the focus of the investigation is not on the automobile, but rather on the package.

In *United States v. Chadwick,* 433 U.S. 1 (1977), this Court considered the search of a footlocker which agents had probable cause to believe contained narcotics which had been loaded into the trunk of a vehicle. In determining that a warrant was required to search the footlocker even though it had been lawfully seized from an automobile, this Court reaffirmed the historical principle that sealed packages are included in the reach of the Warrant Clause. 433 U.S. at 10. *Cf. United States v. Van Leeuwen,* 397 U.S. 249 (1970); *Ex parte Jackson,* 96 U.S. 727 (1878).

This Court explicitly recognized in *Ross* that *Chadwick* still applies. But the contrasting facts in *Ross* and *Chadwick* provide the basis for the distinction between when packages may or may not be searched without a warrant. As in *Ross,* packages may legally be searched without a warrant if they are seized during the course of a legitimate automobile search in which the focus of the search is on the automobile and whatever contents the automobile contains. Packages may be searched only with a warrant where the focus of the investigation is on the packages themselves and not on the entirety of the vehicle in which they are placed.

The facts of this case require the issuance of a warrant prior to the search of the packages themselves. The following are facts from which one must conclude that the focus of the police investigation at the time of the seizure of these packages was on the packages themselves, not on the vehicles:

1. At the scene of the seizure, no search of either of the vehicles was performed. In fact, when asked whether he performed any search, Officer Young indicated that he did not. 11/9/81 Tr. 129. In its MEMORANDUM OF DECISION AND ORDER, the trial court found only that the police officers' "view[ed] the sealed containers" before they handcuffed and arrested the Respondents and took the containers to a warehouse. Pet. App. 21a.

2. There is nothing in the record to establish that a search of the vehicles was performed at any time subsequent to the vehicles being removed from the scene of the seizure.

3. All indications in the record are that the police officers focused their attention exclusively on the packages from the moment they arrived on the scene. Both officers testified at trial that they believed that marijuana was in the boxes because, in their common experience, marijuana was "commonly" packaged in a like manner. They further knew that prior to their seizure of the packages, there had been no odor of marijuana eminating from the trucks and no packages in the trucks when they were stopped a short time earlier by Arizona state police on the highway.

An additional indication that the focus of the investigation was directed at the packages and not the automobile

is the position of the Petitioner before the trial court and the United States Court of Appeals for the Ninth Circuit prior to this Court's decision in *Ross*. Before both lower lower courts, Petitioner's initial position was that the search of the packages at issue was justified without a warrant on the grounds that they were seized, not pursuant to any search, but because they announced their contents by being within the plain view of the officers as they approached the trucks.[3] Indeed, the focus of the police investigation on these packages began, not during a legitimate warrantless search of a vehicle pursuant to the automobile exception, but while the police officers were approaching the Respondents from a distance of 15-30 feet.

Petitioner argues that a line of cases upholding station house automobile searches after some delay supports the search of the packages in this case. Pet. Br. 18-21. Those cases provide no help in determining the legitimacy of the search in this case. In each of those cases, although there was a delay in the search at issue, the subsequent search which the police conducted at the station house was an automobile search with the focus of the investigation on the automobile as a whole and its contents, whatever they might be. For example, in *Florida v. Myers,* No. 83-1726 (Apr. 23, 1984), the defendant's car had initially been searched when he was arrested. His car was then impounded and searched a second time without a warrant

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[3]While it is clear from the trial court's Order and the Opinion of the Court of Appeals that the facts of the case did not put the marijuana in "plain view", the position of Petitioner that the packages were not seized pursuant to a search of the vehicles is a clear indication that the focus of the officers was on the packages.

at which time additional evidence was discovered. When the Florida District Court of Appeal ruled that the evidence found during the second search should have been suppressed, this Court summarily reversed, finding that the second search was subject to the automobile exception. In this case, unlike *Meyers,* there is no evidence of a later vehicle search to which the automobile exception can apply. In this case, the focus was always on the packages.

Juxtaposing this Court's holdings in *Chadwick* and *Ross,* it is clear that the difference between those two decisions is that in *Chadwick,* the focus was on the footlocker, whereas in *Ross,* the focus was on the automobile and the police searched the packages as part of an ongoing vehicle search. In this case, the focus of the police officers, by their testimony and by their actions, was on the packages and not on the vehicles. No legitimate vehicle search was in progress when the packages were seized. Consequently, this case must be governed by the law of package searches, which requires a warrant, and not by the automobile exception to the warrant requirement.

II.

The Reasons Supporting The Ross Exception To The Warrant Clause Do Not Justify This Search.

Even if the Customs officials had conducted a lawful warrantless search of the trucks, they would not have been able to open the packages three days later at the D.E.A. warehouse in Tucson without a warrant. Under normal circumstances, a warrant is required to search packages. An exception to that requirement occurs when the packages are found in an automobile in the course

of a lawful automobile search. Well-established Fourth Amendment principles prohibit the search of these packages, because the reasons that would justify an exception to the warrant requirement if the packages had been searched contemporaneously with the trucks no longer applied when the packages had been secured at the D.E.A. warehouse.

The applicable principles.

The threshold question in any Fourth Amendment analysis is whether a person has a reasonable expectation of privacy in the house, paper or effect that has been seized or searched. *Katz v. United States*, 389 U.S. 347, 351-52 (1967); *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). Unless such a reasonable expectation of privacy exists, the Fourth Amendment inquiry is at an end. *Id.* at 139-40. The expectation of privacy that is necessary to trigger the protection of the Fourth Amendment was separated into two components by Justice Harlan. First, the person must have an actual, subjective expectation of privacy. Second, that subjective expectation of privacy must be one that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). The second component is virtually always met if the person's subjective expectation is objectively justifiable under the circumstances. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Justice Harlan's analysis has been adopted by this Court. *Id.*

If the subjective expectation is recognized, the Fourth Amendment creates a strong presumption in favor of war-

rants. *Mincey v. Arizona*, 437 U.S. at 390 (1978).[4] The few exceptions that have been created to this rule have been specifically established and well-delineated. *Id.* In keeping with the presumption in favor of warrants, these exceptions are no broader than necessary to satisfy the reasons that gave rise to them.[5] This is especially true when an exception allows the search of an area that is normally protected by the warrant requirement. Typically, these exceptions are allowed because the immediate objective requirements of the situation make it impracticable to get a warrant. *See United States v. United States District Court*, 407 U.S. 297, 318 (1972). This Court has

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[4]The *Mincey* court unanimously held that warrantless searches are *per se* unreasonable. 437 U.S. at 390, 405 (Rehnquist, J., concurring in part and dissenting in part). This "first principle of Fourth Amendment jurisprudence", *New York v. Belton*, 453 U.S. 454, 457 (1981), enjoys a long history of support in this Court. *See Ross v. United States*, 456 U.S. at 824-25; *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-53 (1977); *South Dakota v. Opperman*, 428 U.S. 364, 381 (1976) (Powell, J., concurring); *Chambers v. Maroney*, 399 U.S. 42, 61 (1970) (Harlan, J., concurring in part and dissenting in part); *Katz v. United States*, 389 U.S. at 356-57; *United States v. Rabinowitz*, 339 U.S. 56, 70-71 (Frankfurter, J., dissenting); *see Michigan v. Clifford*, No. 82-357 (Jan. 11, 1984), slip op. 4 (plurality opinion); *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L. Rev. 349, 410-11 (1974).

[5]*Segura v. United States*, No. 82-5298 (July 5, 1984), slip op. 7-8 (Stevens, J., joined by Brennan, Marshall & Blackmun J.J., dissenting); *New York v. Belton*, 453 U.S. at 457 (majority opinion), 464 (Brennan, J., joined by Marshall, J., dissenting); *Mincey v. Arizona*, 437 U.S. at 393, 405 (unanimous opinion); *Chambers v. Maroney*, 399 U.S. at 61-62 (Harlan, J., concurring in part and dissenting in part); *Terry v. Ohio*, 392 U.S. 1, 19 (1967); *United States v. Rabinowitz*, 339 U.S. at 70-71 (Frankfurter, J., dissenting); *see Texas v. Brown*, No. 81-419, slip op. 2 (Powell, J., joined by Blackmun, J., concurring in the judgment).

repeatedly rejected attempts by prosecutors to justify searches under these exceptions when the search, which would have been initially permissible without a warrant, has been delayed for sufficient time to make obtaining a warrant practicable. *See e.g., Michigan v. Clifford,* No. 82-357 (Jan. 11, 1984); *Michigan v. Tyler,* 436 U.S. 499 (1978); *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977); *United States v. Chadwick,* 433 U.S. 1 (1977); *cf. Mincey v. Arizona,* 437 U.S. at 393-94; *Chimel v. California,* 395 U.S. 752, 762-63 (1969).

For example, this Court has permitted arresting officers to search any item, including a package, that is in the immediate control of an arrestee. An immediate warrantless search is permissible because there is always some danger that the person arrested may seize and destroy evidence from an area in his immediate control or because he might gain possession of a weapon that could be used against the arresting officers. *Chimel v. California,* 395 U.S. at 763. In *Chadwick,* this Court held that the search incident to arrest exception did not apply to the search of a footlocker that had been taken from the area within the immediate control of the arrestee but not searched until after a delay of one hour when it was secured at a government warehouse. The exception did not apply because once the footlocker was in the exclusive possession of the police, there was no longer any danger that the arrestee might gain access to it to seize a weapon or destroy evidence. It was once again practicable to get a warrant. *United States v. Chadwick,* 433 U.S. at 15; *see also Preston v. United States,* 376 U.S. 364, 368 (1964).

Similarly, in *Michigan v. Tyler,* this Court held that investigators may make an immediate warrantless entry

into a building after a fire has been extinguished to determine its cause and to ensure that it does not reignite. If they want to enter the building days after the fire has been extinguished, however, they must obtain a warrant. 436 U.S. at 511. *Accord G.M. Leasing Corp. v. United States,* 429 U.S. at 361 (Burger, C.J., concurring) (an exigency which would have permitted an immediate warrantless search of a building did not support a warrantless search two days later when it would have been practicable to obtain a warrant).

The principles applied to automobiles.

The Fourth Amendment rule, that a warrant is virtually always required before a person's reasonable expectation of privacy can be invaded by a search, does not apply to automobiles. If police officers have probable cause, they can execute a warrantless search of an automobile where it is found on the street or, if they choose, long afterwards, when it has been impounded at the police station. *Florida v. Meyers,* No. 83-1279 (Apr. 23, 1984), slip op. 3; *Chambers v. Maroney,* 399 U.S. at 51-52. Moreover, if the object of the search might be secreted within the upholstery of an automobile, the police do not need a warrant to rip apart that upholstery to find the evidence or contraband. *Carroll v. United States,* 267 U.S. 132, 153 (1925); *see United States v. Ross,* 456 U.S. at 804-05 & 818.

The reason that society is not prepared to recognize any subjective expectation that automobiles will be free from warrantless searches is that the very same Congress that ratified the Fourth Amendment also enacted a statute

that permitted the warrantless searches of ships, but not the warrantless searches of homes. *Id.* at 805-06. Since the same persons who enacted the Fourth Amendment did not believe that it prevented the warrantless probable cause searches of the predecessors of automobiles, a majority of this Court has reasoned that the Fourth Amendment did not create a guarantee that automobiles can only be searched with the protection of a warrant. *Id.*[6]

Unlike those exceptions which permit a search where a warrant would normally be required, the automobile exception is not limited by the practicability of obtaining a warrant. *See Michigan v. Thomas,* 458 U.S. 259, 261-62 & n.2 (1982); *Texas v. White,* 423 U.S. 67, 68 (1975). *Compare Michigan v. Tyler,* 436 U.S. at 511; *G.M. Leasing Corp. v. United States,* 429 U.S. at 361; *United States v. Chadwick,* 433 U.S. at 15; *Mincey v. Arizona,* 437 U.S. at 393-94. Since a warrant is virtually never required to search an automobile, the practicability of obtaining a warrant before searching an automobile is not relevant.

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[6]In addition to this historical reason, various other reasons have been advanced to justify warrantless automobile searches. Among those are that automobiles are subject to heavy regulation and inspection and that an automobile's main function is transportation, not the repository of personal effects. *See South Dakota v. Opperman,* 428 U.S. 364, 367-68 (1976); *Cardwell v. Lewis,* 417 U.S. 583, 590 (1974); *Cady v. Dombrowski,* 413 U.S. 433, 441-42 (1973). Additionally, on some occasions, the Court has noted that an exigency is created because the mobility of an automobile would allow it to leave the jurisdiction before a warrant could be obtained. *Coolidge v. New Hampshire,* 403 U.S. 443, 459-60 (1971); *Carroll v. United States,* 267 U.S. at 153. Since those cases, however, a majority of this Court has held that an automobile can be searched without a warrant, apart from any exigency that may be created by its mobility. *See Michigan v. Thomas,* 458 U.S. at 261-62 n.2; *Texas v. White,* 423 U.S. at 68.

The principles applied to packages.

In *United States v. Chadwick,* the government attempted to use the same arguments that had persuaded this Court to allow the warrantless search of automobiles to allow the warrantless search of packages. 433 U.S. at 7. With respect to packages, however, the argument did not have the same impressive historical pedigree. One hundred years earlier, this Court had decided *Ex parte Jackson,* 96 U.S. 727 (1878), wherein it was stated that the Warrant Clause applied to packages. *Id.* at 733. The *Chadwick* court followed *Jackson* and held that packages enjoy the full protection of the Warrant Clause. 433 U.S. at 10-11. Since *Chadwick* was decided, this Court has repeatedly stated that the presumption of the Fourth Amendment that all searches be conducted pursuant to a warrant is applicable to packages. *See e.g. United States v. Jacobsen,* No. 82-1167 (Apr. 2, 1984), slip op. 4; *United States v. Place,* No. 81-1617 (June 20, 1983), slip op. 5 & n.3; *Walter v. United States,* 447 U.S. 649 (1980); *United States v. Ross,* 456 U.S. at 812. Moreover, this Court has refused to draw a distinction between worthy and unworthy containers. *United States v. Ross,* 456 U.S. at 822. Instead, this Court has held that all containers, unless their outward appearance announces their contents, manifest a subjective expectation of privacy that society is prepared to recognize and accord the protection of the Warrant Clause. *Id.* at 811-12, 822.

While this Court touched upon the apparent tension that exists between the principles that allow a warrantless search of automobiles and those which do not permit the warrantless search of packages, in *United States v. Chadwick,* 443 U.S. 1 (1977) and *Arkansas v. Sanders,*

442 U.S. 753 (1979), that conflict was not addressed until the Court decided *Robbins v. California,* 453 U.S. 420 (1981). A plurality in *Robbins* held that packages found inside an automobile which was subject to a probable cause search could not be opened and searched without a warrant. *Id.* at 428. Justice Powell concurred, but noted that the dissenters had a strong argument that the right of the police to conduct a warrantless search of the automobile created an exigency as to the packages that would also allow them to search the packages without a warrant. *Id.* at 435 (Powell, J., concurring in the judgment). Justice Powell, however, did not believe that the posture of the *Robbins* case permitted that argument to be addressed, and he therefore concurred in the plurality's judgment. *United States v. Ross,* 456 U.S. at 815-17.

In *United States v. Ross,* the argument was addressed. The *Ross* majority quoted with approval that portion of Justice Powell's opinion suggesting that the automobile exception created an exigency as to the packages. *Id.* at 816. Overruling *Robbins,* the Court went on to hold that if the police have probable cause to believe that contraband or evidence is secreted in some unidentified portion of an automobile, they may search every part of the automobile, without a warrant, including any container found therein that might conceal the object of the search. *Id.* at 824-25.

This Court advanced two reasons to justfy this exception to the normal rule that packages cannot be searched without a warrant. First, the Court reasoned that there is a need for a bright line rule which will clearly tell the police and the lower courts when a warrantless search is

permissible and when it is not. *Id.* at 803-04, 825 (Blackmun, J., concurring), 826 (Powell, J., concurring). Second, the Court noted that the practical considerations involved in an automobile seach would be defeated if packages found inside the automobile could not be searched without a warrant. If a package could not be searched without a warrant, the warrantless search of the automobile would be delayed until a warrant for the package was obtained since, until the package was opened, the police could never be certain that the object of their search was not secreted in a yet-undiscovered portion of the vehicle. That result would be directly inconsistent with the *Carroll* rationale. *United States v. Ross,* 456 U.S. at 820 & 822, n.28. In satisfaction of these practical considerations, the *Ross* Court held that the scope of the search is no broader or narrower than what a magistrate could legimately authorize by a warrant. *Id.* at 825.

Therefore, while the *Ross* Court recognized that packages normally cannot be searched without a warrant, it held that the objective circumstances of an automobile search create an exigency that justifies an exception to that rule. This exception to the Warrant Clause, like its other exceptions, should be "strictly limited by the exigencies which justify its initiation." *Mincey v. Arizona,* 437 U.S. at 393, *quoting Terry v. Ohio,* 392 U.S. at 25-26. *See Michigan v. Clifford,* No. 82-357, slip op. 6-7; *Michigan v. Tyler,* 436 U.S. at 511; *G.M. Leasing Corp. v. United States,* 429 U.S. at 361 (Burger, C.J., concurring); *United States v. Chadwick,* 433 U.S. at 15; *Chimel v. California,* 395 U.S. at 762-63; *Preston v. United States,* 376 U.S. at 367.

The principles applied to this search.

The packages searched in this case were found in trucks near Bowie, Arizona. The packages were not opened or searched until three days later, after the packages had been removed from the trucks and secured at the D.E.A. warehouse in Tucson.

In attempting to justify this search, the Petitioner begins by explaining that packages found in an automobile may be searched without a warrant as part of an automobile search. Pet.Br. 15-16. The Petitioner thereafter almost exclusively relies on the various cases which hold that warrantless automobile searches may be conducted immediately on the scene where the automobile is found, or days later, after it has been secured at the police station. *Id.* at 16-27. None of these cases involve the warrantless search of packages at a government warehouse days after the packages had been removed from an automobile.

There is a strong presumption in favor of search warrants. The few exceptions to this rule are no broader than the reasons that gave rise to them. When an exception permits a search which would normally require a warrant (like the search of a package), the exception is limited by the practicability of obtaining a warrant. Once it becomes practicable to obtain a warrant, one must be obtained before a search will be permitted. *See e.g., Michigan v. Tyler,* 436 U.S. at 511; *G.M. Leasing Corp. v. United States,* 429 U.S. at 361 (Burger, C.J., concurring); *United States v. Chadwick,* 433 U.S. at 15-16; *Mincey v. Arizona,* 437 U.S. at 393-94.

Two reasons support the exception that allows the warrantless search of packages found in an automobile subject to a warrantless search. First, forcing the police to obtain a warrant to search the packages would unnecessarily delay and impede the automobile search, thus undercutting the judgment of the drafters of the Fourth Amendment that vehicles can be searched without a warrant. Second, the police and the lower courts need a bright line dividing when warrantless searches are allowed and when they are not. *United States v. Ross,* 456 U.S. at 803-04, 820-22.

Neither reason supports the search of these packages. First, the search was delayed for three business days. Pet.App. 2a. The agents had ample opportunity to obtain a warrant during those three days. If the agents had obtained a warrant during that period, the search of the trucks themselves would not have been further delayed or impeded. The rationale supporting *Carroll* would not have been undermined. Indeed, it appears that by the time the packages were searched, any search of the trucks had long since been completed. Undoubtedly, this is because the focus of the investigation, right from the beginning, was on the packages, not on the trucks. The first reason for the exception does not offer any support whatsoever for this search.

Second, police and the lower courts need rules of easy application as to when warrants are required. The Petitioner argues that any such bright line rule should allow the search that occurred here. Pet.Br. 23-25, 27 & n.13. But, in formulating any rule that allows a warrantless search where a warrant would normally be required, the first principle of Fourth Amendment jurisprudence, that

there is a heavy presumption in favor of warrants,[7] should be remembered. Any bright line rule should not stray far from this principle. *See Chimel v. California*, 395 U.S. at 765-66; *United States v. Rabinowitz*, 339 U.S. 56, 79-81 (1950) (Frankfurter, J., dissenting). *See also* Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Colum.L.Rev., 1365, 1397 (1983).

Surely, fire investigators need a bright line that will tell them when they can enter a building to determine the cause of a recently extinguished fire. This Court has allowed such an entry immediately after the fire has been extinguished and even a few hours later, if conditions make an immediate investigation impossible. But a warrantless entry a few days later is not permitted. *Michigan v. Tyler*, 436 U.S. at 511. In accordance with the Fourth Amendment presumption in favor of warrants, the bright line was drawn where it became practicable to get a warrant. *Accord United States v. Chadwick*, 433 U.S. at 15-16. Thus, while other pressing law enforcement duties may have permitted a delay of the search of these packages for a few hours, the bright line should be drawn where it became practicable to obtain a warrant.[8] The Petitioner, however, complains that a line

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[7]*New York v. Belton*, 453 U.S. at 457; *see Ross v. United States*, 456 U.S. at 824-25; *Mincey v. Arizona*, 437 U.S. at 393, 405 (unanimous opinion).

[8]This would be consistent with *United States v. Leon*, No. 82-1771 (July 5, 1984). After *Leon*, police officers will be encouraged to always obtain the warrant, as that will insulate them from both civil liability and the Exclusionary Rule. Affirming the Court of Appeals will even further encourage the police to obtain a warrant whenever practicable.

which closely adheres to the Fourth Amendment presumption in favor of warrants will unduly inconvenience law enforcement officials in the completion of their duties. Pet.Br. 25. But the inconvenience to law enforcement officials is never a sufficient reason to dispense with the warrant requirement. *Mincey v. Arizona*, 437 U.S. at 393.

As the Court of Appeals recognized, Pet.App. 11a-12a, the reasons that underlie the *Ross* exception do not support this search. To apply the exception would be contrary to the long line of cases which have refused to expand exceptions to the warrant clause beyond the reasons that gave rise to the exceptions.[9] Given that the reasons for the exception do not apply, Chief Justice Burger's statements for the Court in *United States v. Chadwick* are equally applicable here:

> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the [packages] to be searched come[ ] under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the [packages] were invaded." 433 U.S. at 15-16.

Nonetheless, the Petitioner argues that this case should be governed by the cases which permit a delayed warrantless search of an automobile, Pet.Br. 16. Since the time

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[9]*Michigan v. Clifford*, No. 82-357, slip op. 9; *Michigan v. Tyler*, 436 U.S. at 511; *Mincey v. Arizona*, 437 U.S. at 393-94; *United States v. Chadwick*, 433 U.S. at 15-16; *G.M. Leasing Corp. v. United States*, 429 U.S. at 361 (Burger, C.J., concurring); *Chimel v. California*, 395 U.S. at 762-63.

the Fourth Amendment was enacted, automobiles (or their predecessors) have not been protected by the Warrant Clause.[10] In delineating the scope of the automobile exception, therefore, the practicability of obtaining a warrant is not relevant. The same is not true of packages. Packages normally are protected by the Warrant Clause. Therefore, like other areas that are protected by the clause, the scope of any exception that allows their search should be delineated by the practicability of obtaining a warrant.

The confusion of these principles by the Petitioner is illustrated by its discussion of *Chambers v. Maroney*. *See* Pet.Br. 16. The Petitioner quotes that portion of the *Chambers* opinion where this Court stated that if there is probable cause to search an automobile on the road, "that probable cause factor still obtain[s] at the station house." *Chambers v. Maroney*, 399 U.S. at 52. The Petitioner ignores the next sentence of the *Chambers* opinion where the Court states: "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's impoundment until a warrant is obtained". *Id.* While this may be true of automobiles, it is clearly not true of packages. This Court has repeatedly stated that there is an important difference between impounding a package in anticipation of obtaining a warrant and the warrantless search of a package. *United States v. Place*, No. 81-1617 (June 20, 1983), slip op. 4-5; *Texas v. Brown*, No. 81-419 (Apr. 19, 1983), slip op. 2 (Stevens, J., concurring in the judgment); *Walter*

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[10]*United States v. Ross*, 456 U.S. at 805-06. *But see Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971).

v. United States, 447 U.S. at 654. The Warrant Clause permits the former, but prohibits the latter. *Id.* Therefore, the opening of these packages implicated Fourth Amendment rights that were not touched upon by their mere seizure.

The Petitioner also argues that since the packages could have been searched at the time they were seized, the Respondents had no legitimate expectation of privacy that they would not be searched a few days later. Pet.Br. 23-24. A legitimate expectation of privacy has two components. The District Court found that the Respondents had manifested a subjective expectation of privacy in the packages. See Pet.App. 26a, *see also* 11/10/81 Tr. 40-41. If the packages had been found during the course of a lawful search of the trucks, a warrantless search could have been conducted of them as part of the truck searches. The objective circumstances of the on-going truck searches would have made it unreasonable to fully recognize the Respondents' subjective expectation of privacy. Once the packages had been secured at the D.E.A. warehouse, the objective circumstances had changed. There was no on-going search of the trucks. It was again practicable to obtain a warrant. The Respondents' subjective expectations of privacy should have been fully recognized even though, at some previous time, the packages may have been subject to a warrantless search. *See Michigan v. Tyler*, 436 U.S. at 511; *United States v. Chadwick*, 433 U.S. at 15-16; *G.M. Leasing Corp. v. United States*, 429 U.S. at 361 (Burger, C.J., concurring).[11]

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[11]The Petitioner makes a similar argument in Argument C of its Brief. There, Petitioner argues that since the packages

(Continued on next page)

III.

The Other Reasons Advanced By The Petitioner Do Not Justify Reversing The Court of Appeals.[12]

1) The Court's ruling in Ross that the scope of a warrantless automobile search is as broad as a search that could be authorized by a magistrate should not affect the outcome of this case.

In *Ross*, this Court held that the warrantless search of an automobile could be "as thorough as a magistrate could authorize in a warrant." 456 U.S. at 800. From this holding, the Petitioner argues that the search of the packages was clearly permissible. Pet.Br. 28-30. But, as explained above, the Respondents do not complain of the thoroughness of the search. If the agents were allowed to search the trucks, they were also allowed to contemporaneously search the packages. *United States v. Ross*, 456

(Continued from previous page)

could have been opened at the airstrip near Bowie, the Respondents had a reduced expectation of privacy that would allow the packages to be opened three days later. Pet.Br. 36-37. An expectation of privacy has two components. First, the defendant must have an actual subjective expectation of privacy. Second, that expectation must be objectively reasonable under the circumstances. While the objective component of the expectation of privacy may have been sufficiently diminished when the packages were at the airfield to allow a warrantless search, that does not mean that objective circumstances do not change. Later, when the packages had been secured, unopened, for three days at the D.E.A. warehouse in Tucson, the objective circumstances had changed. It was practicable to get a warrant. The Respondents' reasonable expectation of privacy was complete.

[12]Some of the arguments made in this section of the Petitioner's Brief are very similar to arguments made in other portions of the brief. Answers to those arguments were made above and will not be repeated here.

U.S. at 824-25. Rather, the Respondents' complaint is that the packages were secured for three days in the D.E.A. warehouse before they were opened without a warrant. When this Court said that a warrantless search could be as thorough as a search authorized by a warrant, it was speaking about the instrusiveness of the search, not the length of time that packages could be held without conducting any search whatsoever.

Nevertheless, if the issue were presented, it is doubtful that any magistrate would authorize the seizure of these packages for three days, without their being opened, absent some substantial justification. *See Segura v. United States*, No. 82-5298 (July 5, 1984), slip op. 7-9 (Stevens, J., dissenting). In *Segura*, it was recognized that the police may, under certain circumstances, seize an item in anticipation of obtaining a search warrant. *Id.* at 10-14 (Burger, C.J., joined by O'Connor, J.). The purpose of the seizure, however, is to give the police the opportunity to obtain a warrant. *Id.* Any seizure that is longer than what is longer than what is reasonably necessary to obtain a warrant would be unreasonable. *Id.* at 8-10 (Stevens, J., dissenting). *United States v. Place*, No. 81-1617 (June 20, 1983) is illustrative. There, on reasonable suspicion, the police were permitted to seize a suitcase so that a trained dog could sniff it to determine if it contained contraband. This Court, however, held that the 90-minute detention of the suitcase (which incidentally caused the detention of its owner) was unreasonable, because that was longer than what was necessary to have a dog smell the suitcase. *Id.* at 12-13. *See Segura* at 8 (Stevens, J., dissenting). If the 90-minute detention in *Place* was too long, undoubtedly a magistrate would not have authorized a three day delay in this case.

The government's citation of Fed.R.Crim.P. 41(c)(1), Pet.Br. 30, does not help the government's position. That rule gives the magistrate authority to issue a warrant that authorizes a search "within a specified time period *not to exceed ten days*" (emphasis added). The rule does not mean that all searches may take place within ten days after a warrant is issued. It only states the maximum allowable time period that a magistrate can authorize. In compliance with the reasonableness requirement of the Fourth Amendment, a magistrate might prescribe a shorter period of time. A magistrate would be especially likely to do so if the police had already seized the item to be searched. *Cf. United States v. Place, supra.* The amount of time that would be reasonable under the circumstances is a judgment that should be made by a magistrate, rather than police officers.[13] *See Mincey v. Arizona,* 437 U.S. at 395.

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[13]The Petitioner admits that the delay of a search of seized property may sometimes interfere with a person's possessory (as distinguished from privacy) interest in the property. Pet.Br. 24 n.13. The Petitioner argues, however, that the Respondents cannot make that claim here because there was probable cause to seize the packages and because the Respondents never asserted a possessory interest in the packages. *Id.* Contrary to the government's argument, a seizure of property, in anticipation of a search, even based on probable cause, may become unreasonable if the search of the property is unnecessarily delayed. *See Segura v. United States,* No. 82-5298, slip op. 8-10 (Stevens, J., dissenting). Moreover, the seizure of a package will often be the basis for its owner's arrest. If contents of the package turn out to be innocent, the owner will usually be released and the package returned to him. Therefore, an unreasonable delay in searching a package may cause an unreasonably lengthy detention of its owner. *Cf. United States v. Place,* No. 81-1617, slip op. 12-13 (the ninety minute detention of an airport passenger's suitcase was unreasonable in part because it forced the passenger to stay at the airport with his suitcase). Finally, the Petitioner's assertion that the Respondents never asserted a possessory interest in the packages is contrary to the record. 11/10/81 Tr. 37, 41-43, 45-47.

2) The fact that this argument is presented for the first time in this case is no basis for rejecting it.

The Petitioner argues that the fact that this issue has not been litigated before illuminates the legal profession's understanding that this search was permissible without a warrant (citing *United States v. Ross,* 456 U.S. at 819). Pet.Br. 31, n.16. In support of the "profession's understanding", the Petitioner relies on two cases[14] where the facts presented this issue, but it was not litigated, and on the fact that the Respondent did not raise this issue below. *Id.* When the motion to suppress was litigated below, *Ross* had not yet been decided. In granting the motion to suppress, the District Court relied on *Robbins v. California,* 453 U.S. 420 (1981). Pet.App. 23a. When the parties filed their briefs in the Court of Appeals, *Ross* still had not been decided, and both sides argued the applicability of *Robbins.* Appellant's Br. 9; Appellee's Br. 23-32. Finally, when *Ross* was decided, the Respondents filed a motion with the Court of Appeals to file an additional brief.[15] That motion was denied.

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[14]*United States v. Rivera,* 654 F.2d 1048, *on reh'g.* 684 F.2d 308 (5th Cir. 1982); *Sharpe v. United States,* 712 F.2d 65 (4th Cir. 1983), *cert. granted on other issues,* No. 83-529 (June 18, 1984). The other cases cited by the government did not involve package searches.

[15]While the Respondents did not specifically request permission to address the issue raised by the delay, they did request permission to file an additional brief because the exact boundaries of distinction drawn by *Ross* were not yet known. Opposition to Motion to Submit Briefs/Motion to File Additional Briefs (filed July 30, 1982) 16-17.

The issue raised in this case springs from the different interpretations of *Ross*. *See* Pet.App. 11a-13a; Pet. 21. Prior to *Ross*, most litigants were probably satisfied to rely on *Robbins* and the dicta in *Arkansas v. Sanders*, 442 U.S. at 763-65 that was rejected by *Ross*. 456 U.S. at 824. It should not be surprising, therefore, that the Respondents and other litigants did not raise this issue before *Ross* was decided. This Court in *Ross* relied on fifty years of Fourth Amendment litigation to "illuminate[ ] the profession's understanding". 456 U.S. at 818-19. The Petitioner's citation of two cases decided in the two year period following *Ross* and its truncated history of the litigation in this case are not comparable. In short, there simply has not been sufficient development of the *Ross* doctrine to illuminate the profession's understanding one way or another.

3) The fact that in most automobile searches the police will remove packages from the automobiles before opening them does not justify this search.

The Petitioner notes that in most automobile searches, packages and other containers will be removed from the automobile before they are searched. From this, the Petitioner argues that to the extent the Court of Appeals decision is based on the mere separation of the packages from the trucks before the search, it is untenable. Pet. Br. 33. But, the Respondents' argument is not based on the mere separation of the packages from the trucks. The police may decide for themselves the order of the search and its mechanics. *Cf. Michigan v. Tyler*, 436 U.S. at 510-11 (officials investigating the cause of a fire may leave the building for a short while if conditions make investigation unduly difficult). Rather, both the Court of Appeals

(Pet.App. 9a-13a) and the Respondents interpreted *Ross* in accordance with the well-established principle that exceptions to the Warrant Clause should be no broader than the reasons that justify the exceptions. The reasons that justify the *Ross* exception to the rule that packages can only be searched under the authority of a warrant do not obtain when the packages have been removed from the automobiles and stored in a government warehouse for several days before they are searched. The fact of the packages' removal, by itself, is not significant.

4) The Respondents did not have a diminished expectation of privacy in their packages that would justify this search.

The Petitioner argues that the warrantless search of the packages was justifiable because the Respondents had a diminished expectation of privacy in their packages. Pet.Br. 36-41. In support of this argument, the Petitioner states that since the officers "were justifiably confident that they already knew precisely what they had found", it was reasonable to open the packages without a warrant. Pet.Br. 37-38. The Petitioner appears to be relitigating their claim that these packages could not support any reasonable expectation of privacy because by their very nature they announced their contents. *Arkansas v. Sanders*, 442 U.S. at 764-65, n.13. The District Court, after hearing all the evidence, rejected this argument, finding that "neither the shape nor any other characteristic of the seized containers made their contents readily ascertainable." Pet.App. 28a. This finding was affirmed by the Court of Appeals. Pet.App. 4a-5a. The Petitioner did

not seek review on this issue. Pet. 20. The issue should not be litigated again.[16]

The Petitioner appears to acknowledge this, but nevertheless argues that this warrantless search should be permitted because it was reasonable. Pet.Br. 37-38. In support of this argument, the government relies on the portion of *Cooper v. California,* 386 U.S. 58, 62 (1967), which quotes *United States v. Rabinowitz,* 339 U.S. 56 (1950). The quoted portion of the *Rabinowitz* opinion states the issue is not whether a warrant could have been obtained, but only whether the search was reasonable. *Id.* at 66. That very portion of *Rabinowitz* was overruled by this Court in *Chimel v. California,* 395 U.S. 752, 760 & 768 (1969), which was decided after *Cooper.* In *Chimel,* this Court reasoned that it is not enough to require that warrantless searches be reasonable. There must be some criteria by which to judge their reasonableness. *Id.* at 765. At least where an exception permits a search for criminal evidence that would normally require a warrant, that criteria is supplied by the Warrant Clause. *See South Dakota v. Opperman,* 428 U.S. 364, 381 (1976) (Powell, J., concurring); *United States v. United States Dist. Ct.,* 407 U.S. at 315-16 & n.16. Such a warrantless search is reasonable only if there is a good reason for not obtaining a warrant. *United States v. Rabinowitz,* 339 U.S. at

[16]The district court's finding that the packages manifested a reasonable expectation of privacy was at least in part based on its rejection, on credibility grounds, of the testimony of one of the Customs agents. Pet.App. 20a-22a n.2. The uncertain credibility of the testimony offered by the government below should also preclude the relitigation of this factual issue.

83-84 (Frankfurter, J., dissenting). *See Chimel v. California,* 394 U.S. at 762-65.[17]

The Petitioner also argues that the diminished expectation of privacy which surrounds automobiles should inure to these packages. Pet.Br. 41. But "the word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears". *Arkansas v. Sanders,* 442 U.S. at 761 n.7, *quoting Coolidge v. New Hampshire,* 403 U.S. 443, 461-62 (1971). While it is true that there is a lesser expectation of privacy in automobiles, the same is not true of packages. *United States v. Ross,* 456 U.S. at 811-12; *United States v. Chadwick,* 433 U.S. at 11. Unlike automobiles, packages manifest a full reasonable expectation of privacy. *Id.* The fact that at some earlier time these packages were momentarily in trucks should not mean that they are forever tainted by the diminished expectation of privacy that surrounds the

[17]A different rule may sometimes apply if the search is not for evidence of a crime or does not normally require a warrant. *See e.g., Illinois v. Lafayette,* No. 81-1859 (June 20, 1983) (inventory search and search of an arrestee); *United States v. Edwards,* 415 U.S. 800 (1974) (search of an arrestee); *Chambers v. Maroney,* 399 U.S. 42 (1970) (automobile search); *see South Dakota v. Opperman,* 428 U.S. at 381-84 (Powell, J., concurring); *but see also Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978) (administrative warrant needed for OSHA inspection). Any rule of "reasonableness", however, unconfined by the Warrant Clause, which would allow warrantless searches for evidence of a crime of areas normally protected by the warrant requirement, would rapidly lead to the evaporation of the protections the clause was designed to protect. *Chimel v. California,* 395 U.S. at 764-65; *see United States v. United States Dist.Ct.,* 407 U.S. at 316-18; *Katz v. United States,* 389 U.S. at 356-57; Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 Colum.L.Rev. at 1397.

automobile. Rather, as explained above, a person's reasonable expectation of privacy in a package should be fully recognized unless some objective circumstance, such as an ongoing automobile search, makes it reasonable to invade that privacy without a warrant.[18]

Finally, the Petitioner criticizes the Court of Appeals' analogy to searches incident to arrest. Pet.Br. 42-43. Whatever an arrestee's subjective expectation of privacy

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[18]The Petitioner also argues that this case should be reversed because the core sampling technique involved only a *de minimis* invasion of privacy and that the contents of the packages, if not marijuana, was some agricultural commodity of low privacy value. Pet.Br. 38 n.19. There is absolutely no basis in the record to support the Petitioner's argument. At the beginning of the motion to suppress, the parties stipulated that core samples were removed from the packages. 11/9/81 Tr. 5. There is no evidence on how large the core samples were or on the process by which they were taken. Nor is there any evidence on whether the testing technique employed by the government would have revealed the identity of the substance if it were not marijuana. *See United States v. Jacobsen,* slip op. 12-14. In short, there is no basis to compare this search with the testing of the white powder in *Jacobsen*. Additionally, to the extent that the Petitioner's argument is based on the allegedly low-privacy value of agricultural commodities, it is falacious. As Justice Stewart pointed out in *Robbins v. California:* The Fourth "Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal'. . . . Once placed in . . . a container, a diary and a dishpan are equally protected by the Fourth Amendment." 453 U.S. at 426. (Citations omitted). That portion of the *Robbins* opinion was left undisturbed by *Ross*. *See* 456 U.S. at 822 & n.29. Moreover, these packages were described by the District Court as cardboard boxes or double, opaque, green bags that were sealed with a thick tape. Pet.App. 26a. Other than the testimony that there was the odor of marijuana in and around the area where the trucks were found, 11/9/81 Tr. 127-28, 215, there was no evidence whatsoever which would support a finding that the packages, from their appearance, weight or feel revealed that their contents was some sort of agricultural product.

might be, it has long since been recognized that his person can be searched without a warrant. *Weeks v. United States,* 232 U.S. 383, 392 (1914); *Agnello v. United States,* 269 U.S. 20, 30 (1925). Like automobiles, an arrestee's person may be searched immediately upon arrest, or many hours later, when the arrestee is incarcerated in a jail. *United States v. Edwards,* 415 U.S. 800, 808-09 (1969). Similarly, a package that is within the area under the arrestee's control when he is arrested may be searched without a warrant. *New York v. Belton,* 453 U.S. at 460 (1981). Regardless of any subjective expectation of privacy that the arrestee might have in the package, the objective circumstance of the arrest makes it permissible to search the package without a warrant. *Id.* That objective circumstance no longer obtains, however, if the police elect not to open and search the package on the scene, but instead transport it to the police station where it is secured. Once the package is safely secured at the police station, the police may not open it without first obtaining the approval of a magistrate. *United States v. Chadwick,* 433 U.S. at 15.

The analogy to the instant case is compelling. If the police had lawfully searched the trucks, they were also entitled to contemporaneously conduct a warrantless search of the packages found within the trucks. As in *Chadwick,* however, when the agents elected instead to transport the packages to Tucson and store the packages in the D.E.A. warehouse for three days, they could no longer search them without a warrant. The Petitioner's reliance on *United States v. Edwards* (*see* Pet.Br. 43 n.21) is misplaced. *Edwards* permitted the warrantless seizure

and search of an arrestee's clothing hours after he had been arrested and incarcerated at the local jail. 415 U.S. at 808-09. It did not purport to allow the search of a package that was in the control of the arrestee when he was arrested but not searched until it was secured at a government warehouse. As explained above, that situation, like this case, is governed by *Chadwick* and requires a search warrant.

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CONCLUSION

For all of the above reasons, it is respectfully urged that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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